IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 759 of 2002
With
CRIMINAL APPEAL No. 660 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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MAHAMAD PARVEZKHAN MAHAMAD FARUQKHAN SHAIKH & ANOTHER - Appellants

Versus

STATE OF GUJARAT – Respondent

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Appearance in both the appeals:
MR IM KAPOOR, for MR RAJESH M AGRAWAL, for the Appellants.
MR KT DAVE, ADDITIONAL PUBLIC PROSECUTOR for the Respondent.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 13/01/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Abovenumbered two appeals, filed under Section 374(2) of the Code of Criminal Procedure, 1973, are directed against judgment dated July 26, 2002 rendered by

the learned Additional City Sessions Judge, Ahmedabad City in Sessions Case No. 153 of 2001, by which the sole appellant in Criminal Appeal No. 660 of 2002, who was original accused No. 1 as well as two appellants in Criminal Appeal No. 759 of 2002, who were original accused Nos. 2 and 3 in Sessions Case No. 153 of 2001 are convicted for commission of offence punishable under Section 21 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the Act”, for short) and each sentenced to RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default RI for 2 years.

2. The facts emerging from the record of the case are as under:

Mr. Krishnakumarsinh Chandrakumarsinh Chudasama, who was then Police Inspector, Anti-Terrorist Squad, was on duty in his office in the morning of July 19, 2001. When he was present in his office, his colleague i.e. PI Mr. A.S. Rathod received information from his informant that a person named Rajendra Sharma, who had put on off white coloured full sleeve bush-shirt and coffee coloured pant, was to come with quantity of *brown sugar* at Gate No. 3 of Civil Hospital, Ahmedabad between 10.30 AM and

1.00 PM along with two persons, out of whom one had tied many coloured cotton string on his wrist as well as put on biscuit coloured shirt and coffee coloured pant whereas another person had worn cream coloured lining shirt and biscuit coloured pant and was of sound physique. It may be mentioned that other particulars about two persons, who were to accompany Rajendra Sharma, were also given in the information. On receipt of information, PI Mr. Chudasama asked Police Constable Motibha to summon *panch-witnesses*. He and PI Mr. Rathod also informed their immediate official superior i.e. Mr. A.D. Chudasama, who was then the Deputy Superintendent of Police, ATS. PI Mr. Rathod also informed DySP Mr. Chudasama in writing. At about 10.00 AM, Police Constable Motibha came with two persons who were ready to act as *panch-witnesses*. On interrogation by PI Mr. Chudasama, they disclosed their names to be: (i) Jayesh Babulal Patel; and (ii) Lalitkumar Fulchandbhai Desai. PI Mr. Chudasama ascertained from those persons, who were brought by Police Constable Motibha, whether they were willing to act as *panch-witnesses*. As the abovenamed two persons, brought by Police Constable Motibha, expressed their desire to act as *panch-witnesses*, information received by PI Mr. Chudasama from his colleague PI Mr. Rathod was conveyed to them and first part of the

panchnama was drawn between 10.00 AM and 10.30 AM wherein information received by PI Mr. Chudasama from PI Mr. Rathod was incorporated. As the contents of secret information received were conveyed to DySP Mr. A.D. Chudasama, Dy SP Mr. Chudasama asked Mr. Rameshbhai Iswharbhai Patel, who was also then one of the Police Inspectors of ATS, Ahmedabad, to come to his chamber. Accordingly, PI Mr. Patel, went to the chamber of DySP Mr. Chudasama. At that time, he found that other officers such as Police Inspector Mr. A.S. Rathod, PSI Mr. P.G. Vaghela, Mr. Shah, Mr. Vyas, Police Constable Motilal, Police Constable Chhatrasinh, etc. were present. DySP Mr. Chudasama conveyed information received to PI Mr. Patel. He was also informed that the services of two persons, who were willing to act as *panch-witnesses,* were already requisitioned. Necessary material for conducting the raid such as seal, twine, etc. were collected. Before leaving the office for Gate No. 3 of Civil Hospital, Ahmedabad, an entry was made by PI Mr. Rathod in Movement Register maintained at the ATS Office. The members of the raiding party i.e. PI Mr. K. C. Chudasama, PI Mr. A.S. Rathod, PSI Mr. P.G. Vaghela, Police Constables, *panch-witnesses*, etc. proceeded towards Civil Hospital, Ahmedabad in two different vehicles. The vehicles were halted near Gate No. 1 of Civil Hospital. Thereafter,

the members of the raiding party alighted from the vehicles and maintained a watch. The record of the case indicates that the members of the raiding party were also accompanied by informant of PI Mr. Rathod. At about 12.30 Noon, three persons, answering description given in secret information, were sighted near Gate No. 3 of Civil Hospital, which is opposite State Bank of India. They were also pointed out by the informant of PI Mr. Rathod after which the informant left the place. Thereupon, necessary signals were flashed by PI Mr. A.S. Rathod and PI Mr. K.C. Chudasama to PI Mr. RI Patel. Therefore, PI Mr. Patel with other members of the raiding party rushed to Gate No. 3 to apprehend the accused. On seeing PI Mr. Patel and others rushing towards them, the accused made an attempt to abscond which was foiled. PI Mr. Patel and others introduced themselves to the accused and conveyed to the accused that an information was received that they were in possession of *brown sugar*. One of the accused, who was carrying bag was interrogated. On interrogation, he disclosed his name to be Rajendra Mangilal Sharma, residing at Village: Buda, Taluka: Malhargadh; District: Mandsaur; State of Madhya Pradesh. (He is the sole appellant in Criminal Appeal No. 660 of 2002.) Similarly, another person was interrogated and he disclosed his name to be Mansinh Gordansinh

Kachhava of Village: Aradi; Taluka: Malhargadh; District: Mandsaur; State of Madhya Pradesh whereas third person on interrogation disclosed his name to be Mahamad Parvezkhan Mahamad Faruqkhan Shaikh, residing at Village: Buda; Taluka: Malhargadh; District: Mandsaur; State of Madhya Pradesh. The three accused were informed by Mr. Chudasama that in view of the information received that they were in possession of *brown sugar*, it was necessary to search them and offered the accused to be searched in presence of a Magistrate or a Gazetted Officer, but the said offer was declined by the three accused. The rexine bag, which was carried by accused Rajendra Sharma, who is the sole appellant in Criminal Appeal No. 660 of 2002, was opened and it was found that it was containing 5 packets. It was also found that the 5 packets in turn were containing brown coloured powder. It may be mentioned that the incident in question took place in the month of July and as it was likely to rain, the accused and others were taken to ATS Office, Ahmedabad. At the ATS Office, the bag carried by original accused No. 1, Rajendra Sharma was searched and the search resulted into find of 5 packets. On interrogation, original accused No. 1 stated before the Police Officers that the powder placed in the packets was *brown sugar*. However, it was necessary to ascertain *prima facie* the nature of the

powder which was placed in plastic-bags and, therefore, PSI Mr. Rane was sent with a *yadi* to the office of Forensic Science Laboratory (FSL) to requisition services of one of the officers of FSL. Meanwhile, Police Constable Chhatrasinh was sent to summon a person with scales and weights to weigh the substance found from the possession of accused Rajendra Mangilal Sharma. The person of Rajendra Mangilal Sharma was searched, which resulted into find of Rs. 160/-. A letter was also found from pocket of Mr. Sharma wherein a mobile number was noted down. The search of person of accused No. 2 Mansinh Gordansinh Kachhva resulted into find of cash of Rs. 130 and two letters wherein telephone number, mobile number, addresses, etc were written in Hindi language. The search of person of accused No. 3 Mahamad Parvezkhan resulted into find of black coloured telephone diary and two visiting cards. Police Constable Chhatrasingh secured services of Mr. Jignesh Patel to weigh the substance found from possession of Mr. Sharma. The net weight of *brown sugar* found from possession was ascertained to be 1837 Grams and 700 Milligrams. Meanwhile, PSI Mr. Rane could secure the services of Mr. G.D. Sharma, who was one of the Scientific Officers discharging duties in FSL, Ahmedabad. Mr. G.D. Sharma conducted preliminary tests by taking out 5 Grams of

brown sugar from each packet and opined that the substance analysed was *brown sugar*. Thereafter, from each packet two samples, each of 5 Grams of *brown sugar* were taken and placed in a plastic-tin. Thus, in all, 10 samples were taken and marked as A1, A2, etc. After closing the plastic-tin with its lid, each tin was wrapped in paper. The sample so wrapped was further wrapped with cloth, which was stitched and marked. Thereafter, slip bearing signatures of PI Mr. Chudasama, PI Mr. Rathod and *panch-witnesses* were placed on each sample and tied with twine after which seal, bearing impression of *"Spl IGP (Ops), G.S., Ahmedabad",* was applied. On demand, none of the accused could produce pass or permit authorising him to possess the *brown sugar*. Therefore, they were arrested and drawing of second part of *panchnama* was completed. PI Mr. R.I. Patel lodged his complaint before PI Mr. K. C. Chudasama. PI Mr. Chudasama forwarded the complaint of PI Mr. Patel, *panchnama*, *muddamal*, the three accused, etc. to Police Station Officer of Shahibaug Police Station. On the basis of complaint of PI Mr. Patel, offences were registered against the accused. Initially, the *muddamal* was kept in safe custody by PSO of the Police Station i.e. Jivabhai Pethabhai himself and subsequently, it was handed-over for safe-custody to Crime Writer Head

Constable Popatji Hemtuji at 20-30 Hrs. Crime Writer Head Constable Popatji handed-over the *muddamal* to Police Constable Chhatrasinh Manubha to deliver the same to FSL for analysis. Accordingly, samples were handed-over by Police Constable Chattrasinh Manubha to FSL for analysis. The complaint lodged by PI Mr. Patel was handed-over by Police Station Officer of Shahibaug Police Station to PI Mr. P.G. Vaghela for investigation. Investigating Officer PI Mr. P. J. Vaghela recorded statements of those persons who were found to be conversant with the facts of the case. *Muddamal* was analysed by FSL and its report indicated that the substance analysed was *brown sugar* withing the meaning of the Act. On completion of investigation, the three accused and two others, namely, Khumansinh Kesarsinh and Sumersinh were chargesheeted in the Court of the learned Special Judge on September 5, 2001. It may be mentioned that in the chargesheet, the two accused i.e. (i) Khumansinh Kesarsinh; and (ii) Sumersinh were shown as “absconding”.

3. The learned Additional Sessions Judge, Court No. 15, to whom the case was made over for trial, framed necessary charge against the three accused at Exh. 10. It was read-over and explained to them. They pleaded not guilty to the same and claimed to be tried. The

prosecution, therefore, examined: (i) complainant PI Mr. Rameshbhai Iswarbhai Patel as PW 1, at Exh. 20; (ii) *panch* Lalitkumar Fulchandbhai Desai as PW 2, at Exh. 23; (iii) the then Police Station officer of Shahibaug Police Station Mr. Jivabhai Pethabhai as PW 3, at Exh. 48; (iv) Police Constable Popatji Hemtuji as PW 4, at Exh. 51; (v) Goldsmith, who weighed the substance i.e. Mr. Jignesh Ambalal Patel as PW 5, at Exh. 53; (vi) Police Inspector, ATS, Mr. Krishnakumarsinh Chandrakumarsinh Chudasama as PW 6, at Exh. 55; (viii) Police Constable, who carried *muddamal* to FSL i.e. Chhatrasinh Manuba Chudasama as PW 7, at Exh. 58; and (ix) Investigating Officer Mr. Pravinsinh Gattorsinh Vaghela as PW 8, at Exh. 62, to prove its case against the three accused. The prosecution also produced documentary evidence, such as: (i) complaint lodged by PI Mr. RI Patel, at Exh. 21; (ii) Government Resolution creating ATS in Gujarat State, at Exh. 22; (iii) Resolution prepared under Section 42 of the Act, at Exh. 24; (iv) Resolution indicating compliance of provisions of Section 50 of the Act, at Exh. 25; (v) *panchnama* of search of bag carried by accused Rajendra Sharma which resulted in find and seizure of *brown sugar* weighing 1837 Grams and 700 Milligrams as well as articles found during search of person of the accused, at Exh. 26; (vi) entry from Police

Station Diary indicating that *brown sugar* was seized, at Exh. 49; (viii) forwarding letter addressed by PI ATS to PSO Shahibaug Police Station with which *muddamal*, *panchnama*, complaint, etc. were handed-over to PSO, at Exh. 50; (viii) entry from *Anamati* Register, at Exh. 52; (ix) report indicating that substance seized was analysed at the Police Station by Scientific Officer of FSL and found to be *brown sugar,* at Exh. 57; (x) entry made in the Movement Register indicating that information received was reduced into writing, at Exh. 63; (xi) report of analysis conducted by FSL, at Exh. 74 and (xiii) report by PI to Dy. I.G.P. made under Section 57, at Exh. 65, etc. in support of its case against the three appellants.

4. After recording of evidence of prosecution witnesses was over, the learned Special Judge explained to the appellants circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements, as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the sole appellant in Criminal Appeal No. 660 of 2002 i.e. Rajendra Sharma claimed that he was arrested at 8.00 A.M., but nothing incriminating was found from him and a false case was foisted upon him whereas accused

No. 2 i.e. Mahamad Parvezkhan Mahamad Faruqkhan Shaikh stated in his further statement that he would prefer to state his defence in his written statement, which should be permitted to be filed, and original accused No. 3 mentioned in his further statement that he should also be permitted to file the written statement. It may be stated that only original accused No. 3 filed his written statement. In the said written statement, it was claimed by original accused No. 3 that his maternal aunt i.e. Kanchanben was admitted as an indoor patient for her treatment in Civil Hospital and when her X-ray was to be taken, he was arrested, but he had not come to Ahmedabad for disposal of quantity of *brown sugar* and was falsely involved in the case. It is relevant to notice that no defence evidence was adduced by any of the accused.

5. On appreciation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that original accused No. 1 was found in possession of *brown sugar* weighing 1837 Grams and 700 Milligrams whereas original accused Nos. 2 and 3 were present with accused No. 1 when the said *muddamal* was recovered from original accused No. 1 and, therefore, commission of offence by the accused punishable under Section 21 read with Section 29 of the

Act was established. The learned Judge scrutinised the testimony of PI Mr. Rajendrabhai Patel and held that it was proved that provisions of Sections 42 and 50 of the Act were complied with. The learned Judge negatived the contention raised by the defence that conduct of PI Mr. Patel was unnatural inasmuch as he had apprehended the three accused before *brown sugar* could be delivered to others and held that conduct of none of the Police Officers was unusual or unnatural inasmuch as it was the duty of the Police Officer to apprehend the person who was found to be in possession of psychotropic substance. The learned Judge did not accept the argument advanced by the defence that an adverse inference should be drawn against the prosecution for non-examination of PI Mr. Rathod by holding that the accused were caught red handed with *muddamal brown sugar* and non-examination of PI Mr. Rathod was inconsequential. The learned Judge noticed that *panch* Lalitkumar was an independent witness who fully supported the case of the prosecution and, therefore, the evidence of Police Officers was worthy of acceptance. The learned Judge further held that all the three accused had travelled together and came to Ahmedabad for special reason, as a result of which they were liable to be convicted for commission of offence punishable under Section 21 read with Section 29 of the

Act. In view of abovereferredto conclusions, the learned Judge has convicted the three appellants for commission of offence punishable under Section 21 read with Section 29 of the Act and imposed sentences referred to earlier by judgment dated July 26, 2002, giving rise to abovenumbered appeals.

6. Mr. I. M. Kapoor, learned Counsel appearing for Mr. R. M. Agrawal, learned Counsel of the appellants, contended that the best evidence in the case, to establish that PI Mr. Rathod had reduced into writing the information received by him, as required by Section 41(2) of the Act, is not produced by the prosecution in this case and, therefore, the whole prosecution case should be disbelieved by the Court. Elaborating the contention, it was argued that PI Mr. Rathod was the Police Officer who received the information and not only he is alleged to have entered the information into the Movement Register but was present all throughout during the raid and, therefore, he should have been examined to prove compliance of Section 41(2) of the Act. According to Mr. Kapoor, for not examining PI Mr. Rathod, an adverse inference should be drawn against the prosecution and the case of the prosecution against the appellants should be disbelieved. According to the learned Counsel of the

appellants, the evidence on record clinchingly establishes that an unknown person had identified the accused but neither the said unknown person is examined nor PI Mr. Rathod is examined and, therefore, hearsay evidence of other Police Officers tendered to establish compliance of Section 41(2) of the Act should not be acted upon by the Court. The learned Counsel further contended that even *panchnama* was drawn in presence of PI Mr. Rathod, which was signed by him also, but the testimony of Investigating Officer Mr. Vaghela indicates that he had neither recorded police statement of PI Mr. Chudasama or that of PI Mr. Rathod and, therefore, the prosecution case should be disbelieved, when it is not established that provisions of Section 41(2) were complied with by PI Mr. Rathod. According to the learned Counsel of the appellants, as per the information received, the appellants were to deliver *brown sugar* at Gate No. 3 of Civil Hospital and that they were apprehended with *brown sugar,* near Gate No. 3 of Civil Hospital, Ahmedabad, but PI Mr. Rathod has stated that delivery of brown sugar was to take place at Gate No. 1 of Civil Hospital, Ahmedabad whereas *panch* Lalitkumar has stated that accused were apprehended when they were near Gate No. 1 and as the place of incident is not proved satisfactorily, the prosecution case that the accused

were arrested near Gate No. 3 should be disbelieved. The learned Counsel of the appellants maintained that there are several discrepancies in the evidence adduced by the prosecution such as: (i) the complainant i.e. PI Mr. Patel states that State Bank of India was situated opposite Gate No. 3 whereas *panch* Lalitkumar says that State Bank of India was situated opposite Gate No. 1; (ii) the complainant says that the bag carried by original accused No. 1 was opened at the spot and it was found that it was containing 5 packets whereas *panch-witness* says that bag was for the first time opened at the office of ATS; (iii) the complainant has maintained that complete *panchnama* was written down on the spot but in cross, he has admitted that *panchnama* was not drawn completely at the gate and part was written at the office; (iv) though complete *panchnama* was not drawn near Gate No. 3 of Civil Hospital, the signatures of *panch-witnesses* were not obtained on incomplete *panchnama*; (v) the Police Officers examined in the case have stated that five tests were carried out by Scientific Officer of FSL to *prima facie* ascertain whether the substance found was *brown sugar* whereas the *panch-witness* says that only one sample was taken out from one packet and only one test was conducted; (vi) *panch-witness* Lalitkumar says that three packets were found from bag carried by the original

accused No. 3 and samples of 10 Grams were taken from each packet whereas other witnesses have maintained before the Court that sample of 5 Grams was taken from five packets; (vii) *panch-witness* has not described the seal applied on the samples in detail and has merely stated that the samples were sealed whereas in his cross, he has stated that the seal was applied on each plastic-tin but does not say as to on which part of the sample, the seal was applied;(viii) the complainant has stated in his testimony that one seal was applied on each tin but he has not stated that slips were pasted on the tins whereas PI Mr. Chudasama has stated that one seal was applied on slips bearing signatures of *panch-witnesses* and two samples were wrapped in clothes; (ix) neither in *panchnama* nor in the complaint it is mentioned as to whether the seal was applied, etc. - and in view of these discrepancies, the prosecution case becomes highly doubtful. It was argued that original *muddamal* receipt is not produced before the Court whereas testimony of witness Jivabhai does not indicate that along with *muddamal* packets, he was also handed-over documents indicating compliance of Section 50, whereas witness Popatji, who was handed over *muddamal* for safe custody, in his testimony has stated that there were no slips on packets, but PSO Jivabhai, who was initially handed over

muddamal, has stated that there were slips on packets, and in view of absence of evidence indicating as to who brought back samples from FSL, it should be held that record of *muddamal* was not properly maintained and the appellants are entitled to reasonable benefit of doubt arising from the facts of the case. The learned Counsel contended that the note below Exh. 52 indicates that except *muddamal* bottles, other articles were destroyed by the investigating agency pursuant to order of learned Magistrate dated August 28, 2001 regarding which Station Diary Entry No. 26 of 2001 was made on September 5, 2001 and, therefore, *muddamal* could not have been produced before the Court as indicated in Exh. 17, as a result of which the appellants are entitled to acquittal when it is not satisfactorily proved that what was produced before the Court were packets of contraband items seized from the possession of the original accused No. 1. The learned Counsel has asserted that *panch-witness* in his testimony before the Court has maintained that the samples were sealed and one seal was applied on each plastic-tin whereas the report of the analysis indicates that on each plastic-tin, three seals were found and in view of the discrepancy in number of seals applied, the appellants should be acquitted because possibility of tampering with the samples is not ruled out. According to the learned

Counsel of the appellants, the record does not show that any investigation was made by the Investigating Officer as to who was to take delivery of *brown sugar*, which in turn would indicate that the three appellants were not the real accused and were falsely implicated in the case and, therefore, they should be acquitted. What is maintained is that incomplete investigation is sufficient to exonerate the appellants and, therefore, the appeal should be accepted. It was argued that the PSO of Shahibaug Police Station did not apply his seal on the *muddamal* which was handed-over to him by PI, ATS, more particularly, when ATS has no Police Station of its own and, therefore, in view of breach of provisions of Section 55 of the Act also, the appeal should be allowed. In the alternative, it was argued that *muddamal* was found from possession of the sole appellant in Criminal Appeal No. 660 of 2002, but there is no evidence on the record to indicate that the original accused Nos. 2 and 3 had come together with the original accused No. 1 or stayed together at one place and, therefore, as the prosecution has failed to establish charge of conspiracy and / or abetment, as contemplated by Section 29 of the Act, Criminal Appeal No. 759 of 2002 filed by original accused Nos. 2 and 3 should be accepted. The learned Counsel of the appellants asserted that the learned Judge of the

Trial Court has failed to appreciate the evidence on record in its true perspective and, therefore, the appeal should be accepted. In support of these submissions, the learned Counsel of the appellant has relied upon the decisions rendered in: (i) **Balbir Singh Vs. State of Haryana, (1987) 1 SCC 533;** (ii) **Vasala Vs. State of Kerala, AIR 1994 SC 117**; (iii) **Chand Mohd. Vs. State of Punjab, 1997 Cri. L. J. 810**; (iv) **Bahudar Singh Vs. State of Madhya Pradesh, 2002 Cri. L. J. 579**; (v) **Ouseph Vs. State of Kerala, (2004) 10 SCC 647**; (vi) **Dev Raj Vs. State of H. P., 2005 Cri. L. J. 4580**; and, (vii) **State of Rajasthan Vs. Gurmail Singh, (2005) 3 SCC 59.**

7. Mr. K. T. Dave, learned Additional Public Prosecutor for the State, contended that non-examination of PI Mr. Rathod in this case is of no consequence inasmuch as PI Mr. Chudasama was conveyed the information given by informant of PI Mr. Rathod and as PI Mr. Chudasama had every reason to believe that an offence punishable under Chapter IV had been committed, he had seized and arrested the accused near Gate No. 3, which is a public place, as contemplated by Section 43 of the Act and, therefore, Section 43 of the Act, and not Section 42 of the Act as pleaded by the learned Counsel of the appellants, will apply to the facts of the case.

Elaborating this point, it was contended that PI Mr. K. C. Chudasama is an Officer of Police Department which is mentioned in Section 42 of the Act, and as he had reason to believe that an offence punishable under Chapter IV was committed, he was entitled to search and detain the accused in public place and, therefore, the provisions of Section 43 of the Act would be applicable to the facts of the case. In the alternative, it was argued that PI Mr. K. C. Chudasama also received information from PI Mr. Rathod that the accused were to come near Gate No. 3 of Civil Hospital, Ahmedabad to deliver *brown sugar*, and on receipt of the same, PI Mr. Chudasama reduced the same into writing by mentioning the said fact in first or preliminary part of the *panchnama* which was drawn between 10.00 AM and 10.30 AM, and as PI Mr. K.C. Chudasama is a Gazetted Officer as well as an Empowered Officer within the meaning of Section 41(2) of the Act, the search and seizure cannot be regarded as illegal. The learned Counsel of the State Government stressed that Section 41(2) of the Act requires that a if Gazetted Officer, who is an Empowered Officer, receives information about commission of offence punishable under the Act, he should reduce the same into writing, and as information received was reduced into writing by PI Mr. K. C. Chudasama, all the mandatory provisions of Section 41 were complied with

by him, as a result of which, the appellants are not entitled to any benefit of doubt on the ground that PI Mr. Rathod was not examined in the case by the prosecution. In the alternative, it was pleaded that even if the Court comes to conclusion that PI Mr. Rathod had received the information and, therefore, it was necessary for him to reduce the same into writing, as required by Section 41(2) of the Act, the record shows that the same was reduced into writing by PI Mr. Rathod when the information was mentioned, by making entry in the Movement Register and, therefore, it is wrong to contend that non-examination of PI Mr. Rathod has vitiating effect on prosecution case. The learned Additional Public Prosecutor for the State pointed out that the complainant PI Mr. Patel as well as PI Mr. K. C. Chudasama have categorically stated that they had seen PI Mr. Rathod making entry in the Movement Register though they have stated that they were not knowing as to what were the contents of the said entry or whether in the entry, the information received by PI Mr. Rathod was mentioned or not by him whereas the Investigating Officer, who has proved the entry made by PI Mr. Rathod in the Movement Register, has stated that he was conversant with the writings of PI Mr. Rathod and that the entry was made by PI Mr. Rathod, as a result of which

it is amply proved that PI Mr. Rathod had reduced the information received by him into writing and complied with the provisions of Section 41(2) of the Act. The learned Counsel contended that all the Police Inspectors appointed in the State are Gazetted Officers and also Empowered Officers within the meaning of Section 41(2) of the Act in view of Notification No. GH-L.14-NDS-1087(i)-M. dated 15th June, 1987 issued by the Government of Gujarat in exercise of its powers conferred by sub-section (2) of Section 41 of the Act and, therefore, the requirement of law that the information received should be reduced into writing was complied with not only by PI Mr. K. C. Chudasama but also PI Mr. Rathod, and, therefore, no benefit can be given to the appellants on the ground that mandatory provisions of Section 41(2) of the Act were violated. It was pleaded that as far as place of incident is concerned, it is specifically stated by all the witnesses that the appellants were arrested when they were near Gate No. 3 of Civil Hospital, Ahmedabad. According to the learned Additional Public Prosecutor, the information was received that the accused were to deliver *brown sugar* near Gate No. 3 of the Civil Hospital and they were ultimately arrested when they were near Gate No. 3 of the Civil Hospital, Ahmedabad, and as distance between Gate No. 1 and Gate No. 3 of Civil

Hospital, Ahmedabad is hardly 300 steps, it would not be prudent for the Court to come to the conclusion that no incident had taken place or that the appellants were falsely implicated in the case, as is sought to be contended by the learned Counsel of the appellants. The learned Counsel asserted that discrepancies pointed out by the learned Counsel of the appellants in the evidence adduced by the prosecution witnesses are minor in nature and are on trivial matters and as they do not affect substratum of the prosecution case, the appellants are not entitled to any benefit of doubt at all. According to the learned Additional Public Prosecutor, minor discrepancies in the testimonies of the witnesses would on the contrary indicate that the witnesses were not tutored and had not stated parrot-like story before the Court but narrated the incident as they had seen and perceived and, therefore, their evidence should be accepted by the Court. The learned Additional Public Prosecutor for the State pointed out to the Court that chargesheet in the case against the appellants was filed on September 5, 2001 and no *muddamal* was disposed of, as required by Section 52-A of the Act, as a result of which entry regarding disposal of bottles would not indicate that *muddamal* was disposed of and could not have been produced before the Court at all. Explaining this point,

it was argued that the entry regarding disposal refers to bottles whereas in this case, no bottles are referred to by any of the witnesses and, therefore, there is no manner of doubt that the said entry is relating to another case with which this Court is not concerned. The learned Counsel argued that what is produced at Exh. 52 is entry to establish that samples were handed-over to Constable Chattrasinh to deliver the same to FSL, and as the entry regarding destruction of other *muddamal* does not relate to the instant case, the appellants are not entitled to get any benefit on the ground that *muddamal* was destroyed and could not have been produced before the Court. The learned Counsel further pointed that *muddamal* has been correctly identified by witnesses before the Court and, therefore, it is wrong to contend that *muddamal* was destroyed and could not have been produced before the Court. As far as mode of taking samples is concerned, it was argued that the mode of taking sample was not defective at all and the appellants would not be entitled to any benefit on the grounds that mode of taking sample was defective. The learned Counsel for the State Government emphasised that though it is stated by *panch-witness* that sample was drawn by expert of FSL from one packet and thereafter, tested, PI Mr. Chudasama has categorically stated that expert had taken sample from

each packet and tested whereas report issued by the expert of FSL, produced at Exh. 57, also indicates that sample was drawn from each packet and tested, as a result of which, the Court should not accept the argument that mode of taking sample was defective. The learned Counsel of the State Government pointed out that in paragraph-33 of his testimony, the *panch-witness* has stated that sample of 10 Grams was taken from each packet and submitted that in fact, two samples each of 5 Grams were prepared from each packet and, therefore, the assertion made by the *panch-witness* that sample of 10 Grams was taken from each packet would not establish that mode of taking sample was defective. The learned Counsel further drew the attention of the Court to the contents of *panchnama* and contended that the *panchnama* shows that two samples each of 5 Grams were taken from each packet, which is also referred to by PI Mr. K. C. Chudasama and, therefore, the mode of taking sample cannot be treated as defective. As far as difference in number of seals is concerned, according to the learned Additional Public Prosecutor, it is satisfactorily proved that after seizure was effected, samples were properly drawn and sealed and handed-over to PSO of the Shahibaug Police Station for safe custody and as the prosecution has led satisfactory evidence regarding movement of samples, the

appellants would not be entitled to any benefit on the ground of difference in number of seals on the samples, more particularly, when the report of FSL indicates that the seals on the packets were found to be intact. The learned Counsel argued that the witnesses had deposed before the Court on the basis of recollection of facts and, therefore, discrepancy in number of seals should not be given undue importance. While dealing with the point that investigation was incomplete, it was asserted by the learned Additional Public Prosecutor that investigation was not incomplete at all and every effort was made by investigating agency to find out as to whom the *brown sugar* was to be delivered. According to the learned Additional Public Prosecutor, in the chargesheet itself, it is mentioned that two other accused namely: (i) Khumansinh Kesarsinh; and (ii) Sumersinh were absconding, which would indicate that further investigation was undertaken by the Investigating Officer, and it is not true to contend that investigation was not complete. In reply to the contention that mandatory provisions of Section 55 of the Act were not complied with, the learned Additional Public Prosecutor contended that the sealed samples were handed-over to PSO of Shahibaug Police Station, and as there was no occasion to draw / take further samples, after sealed samples were handed-over to

PSO, it was not necessary for PSO of Shahibaug Police Station to apply his seal. In the alternative, it was argued that provisions of Section 55 are directory and breach thereof would not affect case of prosecution unless prejudice is pleaded and proved. The learned Counsel emphasised that information was received that all the three appellants were to come together near Gate No. 1 of the Civil Hospital, Ahmedabad whereas the appellant No. 1 was in possession of *charas* whereas two others had accompanied him and description about who had accompanied the accused No. 1 was also given and, therefore, provisions of Section 29 of the Act would squarely apply to the facts of the case. It was argued that the original accused Nos. 2 and 3 belong to the same district to which the appellant No. 1 belongs and as all had tried to abscond when an attempt was made to apprehend them near Gate No. 3 of Civil Hospital, Ahmedabad, invocation of provisions of Section 29 of the Act by the learned Judge cannot be said to be erroneous. The learned Counsel asserted that cogent and convincing reasons have been assigned by the learned Judge of the Trial Court for convicting the appellants under Section 21 read with Section 29 of the Act and as the learned Counsel of the appellants has failed to dislodge those weighty reasons, the appeals, which lack merits, should be dismissed.

8. This Court has heard Mr. I. M. Kapoor, learned Counsel appearing for Mr. R. M. Aggrawal, learned Counsel of the appellants as well as Mr. K. T. Dave, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case. As noticed earlier, learned Counsel of the appellants has cited several decisions at the bar for guidance of the Court. In **Prakash Chandra Pathak Vs. State of Uttar Pradesh, AIR 1960 SC 195**, explaining the value of precedents in criminal matters, the Supreme Court has made following amongst other observations in paragraph-8 of reported decision:

> *"Decisions even of the highest court on questions which are essentially questions of fact, cannot be cited as precedents governing the decision of other cases which must rest in the ultimate analysis upon their own particular facts. The general principles governing appreciation of circumstantial evidence are well-established and beyond doubt or controversy. The more difficult question is one of applying those principles to the facts and circumstances of a particular case coming before the Court. That question has to be determined by the Court as and when it arises with reference to the particular facts and circumstances of that individual case. It is no use,*

> *therefore, appealing to precedents in such matters. No case on facts can be on all fours with those of another."*

Again, in **Charan Singh and Others Vs. State of Punjab, AIR 1975 SC 246**, the Supreme Court has held as under in paragraph 32 of the reported decision:

> *"The question of credibility of a witness has primarily to be decided by referring to his evidence and finding out as to how the witness has fared in cross-examination and what impression is created by his evidence taken in the context of the other facts of the case. Criminal cases cannot be put in a straitjacket. Though there may be similarity between the facts of some cases, there would always be shades of difference and quite often that difference may prove to be crucial. The same can also be said about the evidence adduced in one case and that produced in another. Decided cases can be of help if there be a question of law like the admissibility of evidence. Likewise, decided cases can be of help if the question be about the applicability of some general rule of evidence, e.g. the weight to be attached to the evidence of an accomplice. This apart, reference to decided cases is hardly apposite when the question before the court is whether the evidence of a particular witness should or should not be accepted."*

After going through the decisions cited at the Bar, this Court finds that they turn on their own facts and principles laid down therein are not applicable to the facts of this case. Hence, this Court has avoided detailed reference to them so that the judgment, which has otherwise become lengthy, is not burdened,

unnecessarily.

9.1 (i) The contention, that the evidence on record does not indicate that information received by PI Mr. Rathod was reduced into writing by him, as required by Section 41(2) of the Act or that adverse inference should be drawn against the prosecution for withholding the best evidence from the Court, is devoid of merits. It is well to remember that when information was conveyed by informant of PI Mr. Rathod to PI Mr. Rathod, at that time, PI Mr. K. C. Chudasama was present in his office. PI Mr. Rathod had conveyed the information received by him to PI Mr. K. C. Chudasama. Therefore, PI Mr. K. C. Chudasama had deputed Police Constable Motibha to requisition services of two *panch-witnesses*. After deputing Police Constable Motibha to requisition services of two *panch-witnesses*, PI Mr. K. C. Chudasama as well as PI Mr. Rathod had informed DySP Mr. A.D. Chudasama about the information which was received by PI Mr. Rathod from his informant. The testimony of PI Mr. Chudasama further shows that at about 10.00 AM, Police Constable Motibha had brought two persons in the office who were willing to act as *panch-witnesses*. They were Jayesh Babulal Patel and Lalitkumar Fulchandbhai and thereafter, in the company of *panch-witnesses*, PI Mr. Chudasama and PI Mr.

Rathod had gone to the office of DySP Mr. Chudasama. This fact becomes evident if one reads the testimony of complainant PI Mr. Patel, who has stated that he was asked by DySP Mr. Chudasama to come to his chamber and that when he had gone to the chamber of DySP Mr. Chudasama, all were present. Thus, when the information was conveyed by PI Mr. Rathod to PI Mr. Chudasama, PI Mr. Chudasama had every reason to believe that the accused had committed offence punishable under the provisions of the Act and was, therefore, empowered to detain and search the accused near Gate No. 3 of Civil Hospital, Ahmedabad, which is a public place under Section 43 of the Act.

9.1 (ii) The contention, that PI Mr. Rathod, who had received the information, had reason to believe that offence punishable under Chapter IV of the Act was committed by the accused and as PI Mr. K. C. Chudasama had no occasion to form such belief, he could not have detained and searched accused, cannot be accepted. The phrase “reason to believe” in Section 43 of the Act will have to be construed in the light of object of the Act which is to eradicate menace of narcotic drugs and psychotropic substances from the society. “Knowledge” is “awareness” on the part of the person concerned

indicating his state of mind. “Reason to believe” is another facet of the state of mind. “Reason to believe” is not the same thing as “suspicion or doubt” and mere sense cannot also be equated to be believing. “Reason to believe” is on a higher level of state of mind. Likewise, “knowledge” will be slightly on higher place than “reason to believe”. A person can be supposed to know where there is a direct appeal to his senses and the person is presumed to have reason to believe if he has a sufficient cause to believe the same. A person must have reason to believe if the circumstances are such that a reasonable man would of probable reasoning conclude or infer regarding nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference but it is sufficient if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing. These two requirements i.e. “knowledge” and “reason to believe” have to be deduced from various circumstances in the case.

9.1 (iii) The expression “reason to believe” has been interpreted by the Supreme Court in **N. Nagendra Rao and Company Vs. State of Andhra Pradesh, (1994) 6 SCC 205**, to

mean that even though formation of opinion may be subjective but it must be based on material on the record and it cannot be arbitrary, capricious or whimsical and is a check on exercise of power to seize the goods. Again, in **S. Narayanappa And Others Vs. Commissioner of Income Tax, (1967) 1 SCR 590 : AIR 1976 SC 523**, the expression "reason to believe" in Section 34 of the Income Tax Act, 1922, has been interpreted by the Supreme Court to mean a purely subjective satisfaction on the part of Income Tax Officer. According to the Supreme Court, the belief must be held in good faith; it cannot be merely pretence. The Supreme Court has observed that: *"...To put it differently, it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the Section...."* What is explained therein is that the words "reason to believe" suggest that belief must be that of an honest and responsible person based upon reasonable ground.

9.1 (iv) Applying abovereferredto tests to the facts of the instant case, this Court finds that in view of the information conveyed by a responsible colleague, namely, PI Mr. Rathod, PI Mr. K. C. Chudasama had every reason to

believe the information which was conveyed to PI Mr. Rathod by his informant. There was direct appeal to his senses when information received by PI Mr. Rathod was conveyed by PI Mr. Rathod. There was no material on the basis of which PI Mr. K. C. Chudasama could have refused to believe the information conveyed to him by PI Mr. Rathod. It was natural for responsible officer like PI Mr. K. C. Chudasama to conclude or infer regarding the nature of the information conveyed to him by PI Mr. Rathod. As observed earlier, such circumstances need not necessary be capable of absolute conviction or inference. There is nothing on the record which would indicate that reason to belief formed by PI Mr. K. C. Chudasama, that the accused had committed offence punishable under Chapter V of the Act in public place, was arbitrary, capricious or whimsical. The circumstances brought on record are such creating a cause to believe by which chain of probable reasoning leading to the conclusion or inference about the nature of information received by PI Mr. Rathod. Therefore, the detention and / or search of the accused by PI Mr. Chudasama, as he had reason to believe that the accused had committed offence punishable under Chapter IV of the Act, cannot be regarded as contrary to the provisions of Section 43 of the Act.

9.1 (v) Section 43 of the Act *inter alia* provides that any officer of any of the departments mentioned in Section 42 may detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV, and if such person has any narcotic drug or psychotropic substance in his possession and any such possession which appears to be unlawful, the officer has power to arrest him and any other person in his company. PI Mr. K. C. Chudasama is an officer of one of the departments mentioned in Section 42 of the Act. In view of the information conveyed to him by PI Mr. Rathod, he had every reason to believe that the accused had committed an offence punishable under Chapter IV of the Act and, therefore, he was authorised to detain, search and arrest them. As the search and seizure of psychotropic substance had taken in a public place, this Court is of the firm view that provisions of Section 43 would be applicable and not Section 41 of the Act. Therefore, plea based on breach of Section 41 of the Act cannot be accepted.

9.1 (vi) Even if one comes to the conclusion that provisions of Section 41 of the Act are applicable to the facts of the case, the record shows that the information

which was received by PI Mr. Rathod was conveyed to PI Mr. K.C. Chudasama. On receipt of information from PI Mr. Rathod, PI Mr. K. C. Chudasama called *panch-witnesses* and thereafter, reduced the same into writing when he had prepared and drawn preliminary part of *panchnama* between 10.00 AM and 10.30 AM. It is necessary to observe that neither the procedure nor method nor mode of reducing the information into writing is prescribed either under Section 41 or Section 42 of the Act or the Rules made under the Act.

9.1 (vii) In **Abdul Salem Yusufbhai Shaikh Vs. State of Gujarat, 2003 (2) GLR 1643**, an information was received by Police Inspector, Narcotic Cell that one person named Abdul Salem Yusufbhai Shaikh, resident of Jumma Masjid, Navsari was selling *charas*. That information was not reduced into writing either in the Station Diary or in the Register which was being kept and maintained for taking down such information. The Police Inspector in his deposition did not state that he had reduced that information into writing but mentioned that on receipt of the information he had informed about that in writing to the DySP of Narcotic Cell. In that case, it was found that the report under Section 42(2) of the Act was made by Police Inspector to his immediate

official superior where the information received was stated. This has been construed by the Division Bench to mean that the information received by Police Inspector was reduced into writing, as according to the Division Bench, no procedure or method or mode of reducing the information into writing is prescribed under Section 42 of the Act.

9.1 (viii) Again, in **Criminal Appeal No. 640 of 1998** with two cognate appeals decided on July 14, 2005 and July 15, 2005, which were filed by **Abdul Sattar Abdul Rehman and others against the State of Gujarat**, the Dy. S.P. Mr. Raj had received information about commission of offence punishable under the Act. He had informed his immediate official superior on phone and after requisitioning services of *panch-witnesses* prepared first part of *panchnama* immediately. In the *panchnama*, the information received by him was quoted in inverted comas. As the *panchnama* was prepared soon after the receipt of secret information, the Division Bench has held that the information received was immediately reduced into writing.

9.1 (ix) Applying the principle laid down in above quoted decisions to the facts of the present case, this

Court finds that the information, which was received by PI Mr. K. C. Chudasama was reduced into writing by him in inverted comas when he had prepared and drawn first part of *panchnama* between 10.00 A.M. And 10.30 AM. It is well to remember that PI Mr. K. C. Chudasama is a Gazetted Officer and also an Empowered Officer in view of the notification, which has been pointed out by the learned Additional Public Prosecutor for the State and which has been referred to in detail while reproducing the arguments advanced by the learned Additional Public Prosecutor. Therefore, the only duty cast on PI Mr. K. C. Chudasama was to reduce into writing the information received by him. As pointed out earlier, PI Mr. Chudasama had reduced the information into writing when he mentioned the information in inverted comas in the first part of the *panchnama*. Therefore, it is wrong to contend that provisions of Section 41(2) of the Act were not complied with by PI Mr. Chudasama or that the best evidence has not been adduced by the prosecution to establish compliance of provisions of Section 41(2) of the Act.

9.1 (x) Even if one were to agree with the submission of Mr. I. M. Kapoor, learned Counsel of the appellants that PI Mr. Rathod was the officer, who had

received the information and therefore, he was required to comply with provisions of Section 41(2) of the Act, this Court finds that there is ample evidence on record which establishes that even PI Mr. Rathod had complied with the provisions of Section 41(2) of the Act. Complainant PI Mr. Patel and PI Mr. K.C. Chudasama have categorically stated that they had seen PI Mr. Rathod making an entry in the Movement Register though they have said that they were not aware about the contents of the said entry and / or were not knowing whether the information received by PI Mr. Rathod was mentioned in the entry. The entry made by PI Mr. Rathod in Movement Register is proved by Investigating Officer PI Mr. Vaghela. During the course of his examination-in-chief, PI Mr. Vaghela produced Movement Register maintained and kept at ATS Office. After looking at page No. 6 of the said Register, he has stated that Entry No. 100 dated July 19, 2001 made at 10.25 Hours was in the writings of PI Mr. A.S. Rathod and that he was conversant with the signature of PI Mr. Rathod. The assertion made by Investigating Officer Mr. Vaghela that he was conversant with signature of PI Mr. Rathod could not be demonstrated to be false during the course of his lengthy cross-examination. Section 47 of the Indian Evidence Act, 1872 *inter alia* provides that when the Court has to form an

opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact. In view of the testimony of Investigating Officer PI Mr. Vaghela, there is no manner of doubt that he was conversant with the signature of PI Mr. Rathod. Thus, Exh. 63 would indicate that PI Mr. Rathod had made an entry. If one peruses entry produced by prosecution at Exh. 63, it becomes at once evident that PI Mr. Rathod had reduced the information received by him into writing. Thus, the provisions of Section 41(2) of the Act were fully complied with even by PI Mr. Rathod. The contention, that for non-examination of PI Mr. Rathod, adverse inference should be drawn against the prosecution, cannot be accepted having regard to the facts of the case. Section 134 of the Indian Evidence Act, 1872, provides that no particular number of witnesses shall in any case be required for the proof of any fact. The question before the Court is whether necessary entry was made by PI Mr. K. C. Chudasama or by PI Mr. Rathod and whether search of the appellants had resulted into find of *brown sugar* from the possession of original accused No. 1. This fact stands amply and satisfactorily proved by the

reliable testimony of PI Mr. Patel as well as PI Mr. K.C. Chudasama read with that of *panch-witness* Lalitkumar. It was not necessary for the prosecution to examine PI Mr. Rathod, who was all throughout present during the course of raid, to prove the facts which are satisfactorily proved by abovenamed officers. Therefore, no case is made out by the defence to raise any adverse inference against the prosecution. The net result of this discussion is that it is satisfactorily established by the prosecution that provisions of Section 41(2) of the Act were complied with and no benefit can be given to the appellants on the ground that mandatory provisions of Section 41(2) were not complied with.

9.2 The contention, that there is discrepancy regarding place of incident and, therefore, the appellants should be given benefit of doubt, is merely stated to be rejected. It is relevant to notice that in the information which was received by PI Mr. Rathod, it was indicated that the accused were to deliver *brown sugar* near Gate No. 3 of Civil Hospital. It is true that PI Mr. Patel in paragraph 22 of his testimony has stated that delivery of *brown sugar* was to take place near Gate No. 1 of the Civil Hospital, Ahmedabad. It is also true that *panch-witness* Lalitkumar in paragraph-30 of his

testimony has stated that the accused were arrested near Gate No. 1. However, the overwhelming evidence adduced by the prosecution would show that distance between Gate No. 1 and Gate No. 3 of Civil Hospital, Ahmedabad is hardly 300 steps. PI Mr. Chudasama has categorically stated in his testimony before the Court that all the three accused were arrested when they were near Gate No. 3 of the Civil Hospital. The fact that the accused were arrested when they were near Gate No. 3 of the Hospital is mentioned in *panchnama* as well as in the complaint which was lodged without loss of time. Even PI Mr. Patel, who is the complainant, has also stated that the accused were apprehended when they were near Gate No. 3. Even Exh. 50, which is report by PI Mr. Chudasama to PSO of Shahibaug Police Station, indicates that Gate No. 3 of Civil Hospital, Ahmedabad was the place where the incident had taken place. Similarly, report submitted under Section 57 of the Act to immediate official superior also makes it very clear that incident had taken place near Gate No. 3 of the Hospital and that all the three accused were arrested when they were near Gate No. 3 of the Hospital. In view of small distance between Gate No. 1 and Gate No. 3 of Civil Hospital, the contention, that place of incident is not satisfactorily established and, therefore, the appellants should be

given benefit of doubt, cannot be accepted, more particularly in view of reliable testimony of witness examined by the prosecution, which indicates that the incident had taken place near Gate No. 3 of the Hospital and not when the accused were near Gate No. 1 of the Civil Hospital, Ahmedabad.

9.3 The contention, that *muddamal* was destroyed as indicted in note appended to Exh. 52 and could not have been produced before the Court, is factually wrong. This Court has perused the entire record very carefully. It may be stated that Exh. 52 is proved and produced by witness Popatji Hemtuji, who is examined as PW 4 at Exh. 51. It is relevant to notice that witness Popatji Hemtuji was examined to establish the fact that he had received *muddamal,* as mentioned in receipt, and that he had kept *muddamal* in safe custody. He was also examined to prove the fact that on the next day i.e. July 20, 2001, he had handed-over *muddamal* to Constable Chhatrasinh Manuba with instructions to deliver *muddamal* to FSL for analysis. In order to prove that *muddamal* was handed-over to Constable Chhatrasinh Manuba to be delivered to laboratory for analysis, witness Popatji has produced Entry No. 47 on page No. 20 of *Anamati* Register. It is relevant to mention that on the first page of this

document, the learned Judge has mentioned Exh. No. 52, giving an impression that the whole document was exhibited and given Exh. No. 52. However, further perusal of this document makes it very clear that only one entry, as mentioned by witness Popatji in his testimony, is exhibited at Exh. 52. The entry exhibited indicates that *muddamal* was handed-over by witness Popatji to Constable Chhatrasinh Manuba to be delivered to FSL for analysis. Further, the entry indicating destruction of *muddamal inter alia* mentions that except *muddamal* sample bottles, other *muddamal* was destroyed pursuant to order of the learned Magistrate dated August 28, 2001 regarding which Station Diary Entry No. 26 of 2001 was posted on September 5, 2001. It is difficult to believe that even before submission of chargesheet, *muddamal* would be destroyed. In this case, there are no *muddamal* sample bottles. It is relevant to notice that chargesheet in the case was submitted by the Investigating Officer on September 5, 2001 and *muddamal* was produced on the same day before the Court vide *muddamal* list, which is at Exh. 17. *Muddamal* produced before the Court has been correctly identified by Police Officers examined in the case. If *muddamal* had been destroyed, it would not have been possible for the Police Officers to identify the same before the Court.

Therefore, there is no manner of doubt that entry regarding the destruction of *muddamal* relates to another case and not to this case. Merely because some mistake has been committed by the officer while maintaining *Anamati* Register, the learned Counsel of the appellants has made a mountain out of a mole and raised contention which has no factual basis at all. The learned Advocate, who conducted the trial on behalf of the accused before the Trial Court, did not raise such a point at all because, he knew very well that *muddamal* in the case was produced before the Court, as required by law. No suggestion was made to any of the Police Officers that *muddamal* was already destroyed and what was produced before the Court was something else. On the facts and in the circumstances of the case, this Court is of the opinion that it is not even distantly probabilised by the defence that *muddamal* seized was not produced before the Court and was destroyed even before filing of the chargesheet. Further, Section 52-A of the Act provides as to how seized narcotic drugs and psychotropic substances should be disposed of. Sub-section (2) of the said section, which would be applicable to the facts of the case, makes it clear that several steps have to be taken and several records have to be maintained before disposal of seized narcotic drugs and psychotropic

substances. It is not the case of the defence that any such recourse was made by the Investigating Officer for disposal of substances seized, as required by Section 52-A of the Act. Under the circumstances, the contention, which is based on destruction of *muddamal* and / or non-production of *muddamal* before the Court, has no basis and is hereby rejected.

9.4 The plea, that mode of taking sample was defective and, therefore, reasonable benefit of doubt should be accorded to the appellants, has no substance at all. It is true that *panch-witness* Lalitkumar in his testimony before the Court has stated that the expert summoned from FSL had taken one sample from one packet and tested the same. However, PI Mr. Chudasama has categorically stated that the expert summoned from FSL had taken five different samples from five packets and tested all of them. The report, which was submitted by the expert of FSL and produced by the prosecution at Exh. 57, also indicates that sample was drawn from each of the five packets and tested. Therefore, on the basis of solitary statement made by *panch-witness*, one need not jump to the conclusion that mode of taking sample was defective. According to the learned Counsel of the appellant, the statement made by *panch-witness,* in

paragraph-33 of his testimony, that sample of 10 Gram was taken, would also indicate that mode of taking sample was defective, has no substance. It is relevant to notice that from each packet, two samples each of 5 Grams was taken out. Thus, from each packet, a sample of 10 Grams was taken. Viewed in the light of this fact, the statement made by *panch-witness,* in paragraph 33 of his testimony, that sample of 10 Grams was taken out, would not indicate that mode of taking sample was defective. Further, the *panchnama* indicates that two samples of 5 Grams was taken from each of the five packets. This fact is also categorically and affirmatively stated by PI Mr. Patel and PI Mr. Chudasama in their respective testimony. On the facts and in the circumstances of the case, this Court holds that the expert from FSL had taken out sample of 5 Grams from each packet and tested whereas while preparing samples, two samples each of 5 Grams were taken from each packet and, therefore, the mode of taking sample cannot be said to be defective at all.

9.5 (i) The contention, that difference in number of seals on samples taken would indicate that there was possibility of tampering with the same and, therefore, reasonable benefit of doubt should be accorded to the appellants, has no substance. Before considering

possibility of tampering with *muddamal*, it is the duty of the Court to ascertain whether sealing procedure adopted by the Police Officers concerned was foolproof or was defective and whether the samples were kept in safe custody before they reached FSL for analysis. The evidence of PI Mr. Patel read with that of PI Mr. Chudasama makes it very clear that first of all two samples, each weighing 5 Grams was taken out from each packet. Thereafter, each sample so taken out was placed in plastic-tin, which was closed with its lid. After closing the plastic-tin, it was wrapped in white paper and thereafter, it was wrapped in cloth which was stitched. The record further shows that after so stitching, slips bearing signatures of PI Mr. Chudasama and PI Mr. Rathod as well as those of *panch-witnesses* was placed on each sample. The slip was firmly affixed by tying the twine and thereafter, the seal bearing impression *"Spl. IGP (Op.) G.S. Ahmedabad"* was applied. The sealing procedure resorted to by Police Officer concerned makes it very clear that it was foolproof. If any attempt had been made to tamper with the same, the slips bearing signature of *panch-witness* would have been torn and thereafter, it would not have been possible to affix the slips bearing signatures of the *panch-witnesses* on the samples. It is nobody's case that the slips

bearing signatures of the *panch-witnesses* were found torn when the samples were received by FSL for analysis. Thus, procedure resorted to by the Police Officer for sealing the samples was effective as well as foolproof and rules out any possibility of tampering with the samples.

9.5 (ii) There is yet another facet of this question which must be considered by the Court. The evidence on record establishes that after the samples were prepared and complaint was lodged by PI Mr. Patel, PI Mr. Chudasama had addressed a forwarding letter to Police Station Officer of Shahibaug Police Station and handed-over *muddamal*, complaint, *panchnama*, accused, etc. to the PSO. The testimony of witness Jivabhai Pethabhai, recorded at Exh. 48, would indicate that he was PSO of Shahibaug Police Station on July 19, 2001 and that after registering offences, he had handed-over complaint of PI Mr. Patel to PI Mr. P. G. Vaghela for investigation. His testimony further establishes that he had also taken into custody *muddamal* handed-over to him. According to him, at 20-30 Hours on July 19, 2001, he had handed-over *muddamal* to Crime Writer Head Constable Popatji Hemtuji. The testimony of Crime Writer Head Constable Popatji Hemtuji, recorded at Exh. 51, shows that on July 19, 2001

at 20-30 Hours, he had received *muddamal* as mentioned in *pouti i.e.* receipt. According to him, after receiving *muddamal*, he had kept the same in safe custody. What is mentioned by this witness before the Court is that on the next day i.e. on July 20, 2001, he had handed-over the five samples bearing Mark A/1 to E/1 to Constable Chhatrasinh Manubha to be delivered to FSL for analysis. In support of this assertion, the witness has produced Entry No. 47 made on page 20 of *Anamati* Register. A bare perusal of the said entry which is produced at Exh. 52 makes it evident that on July 20, 2001, Crime Writer Head Constable Popatji Hemtuji had handed-over *muddamal* to Constable Chhatrasinh Manubha to be delivered to FSL for analysis. The testimony of Police Constable Chattrasinh Manubha recorded at Exh. 58 makes it very clear that on July 20, 2001, when he was present in ATS Office, he was directed by PSI Mr. P. G. Vaghela to collect samples from Crime Writer Head of Shahibaug Police Station and obtained *Ravangi Yadi* as well as samples to be delivered to FSL for analysis. The witness has stated that accordingly, he had gone to the Shahibaug Police Station and was handed-over samples to be delivered to FSL for analysis. The witness has further asserted, in his testimony before the Court, that he had taken the samples to FSL with *yadi* and delivered the same for analysis. To

substantiate his say, this witness has produced necessary document at Exh. 59. Thus, the chain is fully established by the prosecution that after the samples were taken, they were kept in safe custody and delivered intact to FSL. The prosecution has produced report of the FSL at Exh. 64. It indicates that on July 20, 2001, five samples, bearing Mark A/1 to E/1 were received by FSL for analysis bearing seal of *"Spl. IGP (Op.) G.S. Ahmedabad"* and that those seals were intact. The report also shows that from below the seals, applied on the samples bearing Mark A/1 to E/1, slip dated July 19, 2001 bearing signatures of four persons was found. In the light of above evidence, the Court will have to consider the question whether difference in number of seals would indicate that there was possibility of tampering with the samples and, therefore, the appellants should be granted benefit of doubt. On the facts and in the circumstances of the case, this Court finds that foolproof and effective procedure was resorted to by the Police Officer concerned for sealing the samples and the samples were kept in safe custody till they reached FSL for analysis and as report of the analysis indicates that the seals applied on the samples were intact, difference in number of seals would not indicate that there was possibility of tampering with the samples. It is relevant to notice

that the statement made by *panch-witness,* in his testimony before the Court, as well as by PI Mr. Chudasama that one seal was applied on the sample, cannot be construed to mean that other seals, as found by FSL, were not applied, more particularly, when *panchnama*, which is first document in point of time, does not indicate that only one seal was applied and that more than one seals were not applied. The principle laid down in **Dev Raj Vs. State of H. P.** ***(supra)*** is of no assistance to the appellants. In that case, there was possibility of another sample having been sent to the Chemical Examiner for analysis and that aspect of the case had rendered prosecution case open to doubt. However, in this case, this Court has found that the possibility of another sample having been sent to the Chemical Examiner for analysis is not even remotely probabilised. In the said case, it was asserted by the Police Officer concerned that all the samples were packed separately and sealed with seal “T” by putting three seals on each packet, but report of the Chemical Examiner indicated that the number of seals put on the sample was one. In the said case, it was further found that the investigation was not fair and honest and as possibility of another sample having been sent to the Chemical Examiner for analysis was not entirely ruled out, benefit

of doubt was given to the appellant. Here, in this case, possibility of another sample having been sent to the Chemical Examiner for analysis is entirely ruled out and, therefore, no benefit can be given to the appellants on the basis of judgment relied upon by their learned Counsel.

9.6 The contention, that record of *muddamal* was not properly maintained and therefore, also, the appellants should be given benefit of doubt, is devoid of merits. This plea is essentially based on the premise that original *muddamal* was not produced before the Court. However, this Court has examined original record itself and finds that along with chargesheet original *muddamal* was also produced. It is true that Police Constable Popatji has stated that there were no slips on the packets when he had received *muddamal* whereas Police Station Officer Jivabhai has stated that there were slips on the pockets. However, from this discrepancy in testimony, one need not jump to the conclusion that record of *muddamal* was not properly maintained. It is relevant to notice that the witnesses were deposing before the Trial Court after a lapse of considerable time. Further, they were subject to gruelling cross-examination and, therefore, there are bound to be minor

discrepancies in their testimony. The record does not indicate that *muddamal* was not properly maintained. As mentioned above, *muddamal* was properly sealed and kept in safe custody and had reached FSL intact. Therefore, no benefit can be given to the appellants on the basis that record of *muddamal* was not properly maintained.

9.7 The contention, that the investigation was not complete and, therefore, the appellants should be acquitted, is merely stated to be rejected. The case of the prosecution is that the accused were found in possession of *brown sugar* which is a psychotropic substance without pass or permit on July 19, 2001 near Gate No. 3 of Civil Hospital, Ahmedabad. By examining the witnesses, the prosecution has proved that fact. It is true that in the information, it was indicated that the accused were to effect delivery of *brown sugar* near Gate No. 3 of Civil Hospital, Ahmedabad and before delivery could be effected, the accused were arrested. However, that would not indicate that the investigation was not complete. The chargesheet submitted by the Police Officer before the Court makes it very clear that two persons namely, Khumansinh Kesarsinh and Sumersinh were shown to be absconding. Necessary efforts were made to trace those who were to take delivery but those two

persons could not be apprehended. The learned Counsel of the appellants has failed to convince the Court that the investigation was not complete. On the facts and in the circumstances of the case, no benefit can be given to any of the appellants on the ground that investigation was not complete.

9.8 The plea, that provisions of Section 55 of the Act were not complied with by PSO of Police Station and, therefore, the appellants should be acquitted, is devoid of merits. After referring to the decision rendered in **Gurbax Singh Vs. State of Haryana, (2001) 3 SCC 28**, the Supreme Court in **Babubhai Odhavji Patel Vs. State of Gujarat, AIR 2006 SC 102**, has held that Sections 52, 55 and 57 of the NDPS Act are directory. This Court does not find any serious violation of provisions of Section 55 of the Act because sealed samples were handed-over by PI Mr. Chudasama to PSO of Shahibaug Police Station and, thereafter, there was no occasion to take further samples from the sealed samples which were already handed-over to PSO of the Police Station. Having regard to the scheme envisaged by Section 55 of the Act, this Court is of the opinion that it was not necessary for the Police Station Officer of Shahibaug Police Station to apply his own seals on the samples received by him for safe custody and

no benefit can be given to the appellants on the ground that provisions of Section 55 of the Act were not complied with by PSO of the Police Station.

9.9 The last submission, that the two appellants in Criminal Appeal No. 759 of 2002 could not have been convicted with the aid of Section 29 and therefore, their conviction should be set aside, has also no substance. It is relevant to notice that in the information, it was indicated that three persons were to come near Gate No. 3 to effect the delivery of *brown sugar*. The description of the two appellants in Criminal Appeal No. 759 of 2002 was fully given. The evidence on record would show that all the three had come together near Gate No. 3 of Civil Hospital, Ahmedabad and that the informant of PI Mr. Rathod had identified the appellants in Criminal Appeal No. 759 of 2002 also. What is relevant to notice is that not only those appellants were found to be answering to the description given in the information but they had made an attempt to abscond when they were sought to be apprehended. This Court notices that the appellant No. 1 in Criminal Appeal No. 759 of 2002 is resident of Village: Buda to which, the sole appellant in Criminal Appeal No. 660 of 2002, who was found in possession of *brown sugar*, belongs whereas the appellant No. 2 in

Criminal Appeal No. 759 of 2002 belongs to the same district to which the sole appellant in Criminal Appeal No. 660 of 2002 belongs. As noticed earlier, the fact that all the three accused were arrested near Gate No. 3 of Civil Hospital, Ahmedabad stands firmly established by reliable testimony of witness examined in the case. In the light of these established circumstances, the Court will have to consider the question whether the appellants in Criminal Appeal No. 759 of 2002 can be fastened with liability with the aid of Section 29 of the Act. Section 29 of the Act *inter alia* provides that whoever abets, or is a party to the criminal conspiracy to commit, an offence punishable under Chapter IV, shall be punishable with the punishment provided for the offence. The terms “abetment” and “conspiracy” will have to be construed in the light of their definitions given in the Indian Penal Code, 1860. So construed, it becomes at once evident that the two appellants in Criminal Appeal No. 759 of 2002 had conspired with the sole appellant in Criminal Appeal No. 660 of 2002 to deliver *brown sugar* near Gate No. 3, pursuant to which conspiracy, the sole appellant in Criminal Appeal No. 660 of 2002 was found in possession of *brown sugar*. It is relevant to notice that the two appellants in Criminal Appeal No. 759 of 2002 are not strangers to the sole appellant in Criminal Appeal

No. 660 of 2002. Even if one comes to the conclusion that the conspiracy, as required by law, is not established, this Court does not find any difficulty in concluding that in any view of the matter, the appellants in Criminal Appeal No. 759 of 2002 had abetted the sole appellant in Criminal Appeal No. 660 of 2002 in commission of offence punishable under the Act. Therefore, the conviction of the two appellants in Criminal Appeal No. 759 of 2002 with the aid of Section 29 of the Act cannot be regarded as erroneous so as to warrant interference of this Court in instant appeal.

10. The discussion above makes it clear that there is no merits in any of the abovenumbered appeals. Therefore, both the appeals are liable to be dismissed. Accordingly, both the appeals are dismissed. *Muddamal* be disposed of in terms of directions given by the learned Judge of the Trial Court in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath